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Upholding the Revised Refugee Executive Order: A Virginia District Court Clarifies the Establishment Clause Issues

By **Peter Margulies** Sunday, March 26, 2017, 8:30 AM

On Friday, Virginia U.S. District Judge Anthony J. Trenga upheld President Trump's revised Refugee Executive Order (EO), ruling that the EO did not violate the Establishment Clause (*see* Josh Blackman's discussion *here*). The court cited the Supreme Court's 1972 decision in *Kleindienst v. Mandel*, which held that executive actions taken at the intersection of national security and immigration under congressionally delegated authority need only be "facially legitimate and bona fide." Judge Trenga's opinion is a useful companion to Judge Alex Kozinski's lucid dissent from the Ninth Circuit's refusal to grant a rehearing of the government's request to stay the halt of the *original* EO (*see* Judge Kozinski's dissent and other Ninth Circuit opinions in the case *here*).

The Virginia district court decision, *Sarsour v. Trump*, will not have an immediate impact, since earlier Maryland and Hawaii district court decrees halting the revised EO remain in effect. However, as a prelude to an expected showdown in the Fourth Circuit Court of Appeals, Judge Trenga's decision highlights the perils of judicial reliance on inherently variable campaign statements to second-guess executive action in the complex realm of immigration and national security.

Judge Trenga has a track record that demonstrates his own independence on these issues. He wrote a thoughtful opinion finding that procedures used to maintain the government's no-fly list provided insufficient safeguards for individuals who appeared on the list (*see* the opinion *here*, Shirin Sinnar's paper *here*, and Irina Manta and Andra Robertson's discussion *here*). From this neutral perspective, Judge Trenga determined the revised EO was lawful because it was sufficiently tailored to facially legitimate national security interests. That tailoring, Judge Trenga found, rebutted any claim that religious animus prohibited by the Establishment Clause drove enactment of the revised EO.

Judge Trenga based his holding in large part on a simple proposition: all presidents learn while in office, and that's a good thing. Courts evaluating the lawfulness of national security measures should encourage that learning, rather than linking presidents permanently and inextricably to statements made in the fierce crucible of political campaigns. Judge Trenga noted that the revised EO exempts lawful permanent residents (LPRs) and current visa-holders (VHs) and authorizes "multiple ... case-specific waivers" to promote family reunification, education, and business and professional interests—the interests invoked by virtually all of the plaintiffs in the challenges to the revised EO. Moreover, the revised EO contains extended analysis of the turbulent conditions in five of the six countries (Libya, Somalia, Sudan, Syria, and Yemen) still subject to restrictions on visa grants, and the long history of sponsorship of terrorism by the sixth country, Iran.

Given the changes in the revised EO, the court found, the revised EO was "materially different in structure, text, and effect" from the original EO. Those changes limited the "probative value" of the President's campaign statements in demonstrating the religious animus required for a violation of the Establishment Clause under the Supreme Court's test in *Lemon v. Kurtzman* (1971). To hold otherwise, the court reasoned, would render the President "effectively disqualified" from *ever* exercising "lawful presidential authority" at the intersection of national security and immigration. Permanently paralyzing a President would undermine the virtues of decisiveness and "dispatch" that Alexander Hamilton associated with the executive branch.

Judge Trenga expertly analyzed the institutional costs of tarring a President's entire tenure in office with the myriad, often contradictory assertions made by political *candidates*. In this sense, Judge Trenga's decision dovetailed with the incisive analysis of Judge Kozinski, who noted that candidates habitually make different assertions to different audiences at different times, and sometimes make different assertions to the *same* audience. For Judge Kozinski, Franklin Roosevelt was a case in point (for a similar point regarding FDR, *see* my previous post *here*).

The FDR example warrants further examination. In a speech on the eve of the 1940 election addressing the United States' defense capabilities as World War II engulfed Europe, Roosevelt pledged, "Your boys are not going to be sent into any foreign wars." Yet in the same speech, Roosevelt acknowledged that "dangers to all forms of democracy throughout the world" had become "obvious." Less than two months before the speech, Roosevelt had agreed in the so-called "Destroyer Deal" to send Britain fifty outmoded U.S. Navy destroyers in exchange for the ability to maintain bases in British possessions such as Antigua and Bermuda. FDR's warning about pervasive "dangers to ... democracy" was a barely veiled reference to the Axis powers of Germany, Italy, and Japan. Did that warning discredit the legal view expressed by Roosevelt's attorney general, future Supreme Court Justice Robert Jackson, that the Destroyer Deal complied with the U.S. Neutrality Act passed by a stubbornly isolationist Congress? Or, inversely, did Roosevelt's pledge that U.S. troops would not intervene in any "foreign wars" suggest that Roosevelt actually viewed the threat of war as remote, thus casting doubt on the national security rationale for the Destroyer Deal?

With the benefit of hindsight, it's clear that Roosevelt's actual state of mind at the time of the 1940 speech best harmonized with the former scenario— Roosevelt believed World War II would eventually involve the U.S. and sought to maintain Britain's strength until that moment arrived, justifying aid to Britain with an ingenious but strained reading of the relevant statutes. As former Obama White House Counsel Bob Bauer notes in an insightful new piece, the President needs some space for such legal positions, even if they don't represent the "best" view of the law. Looking back, boxing in FDR's expert moves in that crucial period would have ill-served U.S. interests, constitutional government, or international law. Yet, that kind of paralysis is the logical end product of the rigid focus on campaign statements by the revised EO's challengers.

To be clear, President Trump is not FDR. Moreover, while the Destroyer Deal was a wise policy, I believe the revised EO's effects will be counterproductive (for a valuable discussion of the threats *not* addressed by the EO, see Jane Chong's analysis [here](#)). That said, constitutional law should not turn on the wisdom of particular policies, but on the institutional impact of legal rules. An undue fixation with campaign statements would have paralyzing institutional effects, as Judge Trenga recognized. In the realm of politics and policy, opponents of the EO can cite President Trump's campaign statements as one element in their arsenal of arguments. However, in the realm of law, the need to avoid institutional paralysis should temper judicial reliance on assertions made in the heat of political campaigns.

Topics: Refugees

Tags: refugees, immigration, Donald Trump, Kleindienst v. Mandel, Lemon v. Kurtzman, Sarsour v. Trump

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